

O'CONNOR PLAYDON GUBEN & INOUE LLP
A LIMITED LIABILITY LAW PARTNERSHIP

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Attorneys for Movant
EBBTIDE, LLC

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re

HAWAIIAN EBBTIDE HOTEL,
INC.,

Debtor.

Case No. 19-00227
(Chapter 11)

Hearing:

Date: May 21, 2019

Time: 9:30 a.m.

Judge: Honorable Robert J. Faris

Docket Reference #26

**EBBTIDE LLC'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO ANNUL AUTOMATIC STAY RETROACTIVE
TO THE PETITION DATE, FEBRUARY 25, 2019;
EXHIBITS A TO C**

Ebbtide, LLC ("LLC") files this Memorandum in Support of its Motion to Annul Automatic Stay Retroactive to the Petition Date (Dkt. No. 14) and as per Notice of Hearing filed on April 24, 2019 (Dkt. No. 26).

I. BACKGROUND

In the Reply Memorandum (Dkt. No. 22), LLC argued that “bad faith” was a ground for granting relief from stay.

Since the April 24, 2019 hearing (Dkt. No. 25), the Debtor,

(1) has not filed a monthly operating report (“MOR”) for the months of March *and* soon April, due on May 20, 2019. See Exhibit A, Docket Sheet for Bk. No. 19-00227.

(2) the Debtor has filed its Application to Employ Christopher S. Woo as Attorney for Debtor-in-Possession (Dkt. No. 30). The Office of the United States Trustee filed its United States Trustee's Objection to Debtor's Application To Employ Counsel (Dkt. No. 31).

(3) the Debtor designated Marc T. Kumai as the Responsible Individual (Dkt. No. 29).

(4) at the First Meeting of Creditors, the Designated Person, John Wollstein, explained the Debtor’s pre-petition arrangement with Mr. Kumai.

(5) the Office of the United States Trustee filed a Motion to Convert Chapter 11 Case to Chapter 7 Or, Alternatively, To Dismiss Case (Dkt. No. 32).

The LLC in its Reply of April 16, 2019 (Dkt. No. 22), wrote at pp. 5-7, that pursuant to In the Matter of Arkansas Company, 798 F.2d 645 (3d Cir. 1986),¹ as why “prior” approval of counsel is superior to any “retroactive” or “*nunc pro tunc*” approval of counsel:

It does not follow that such retroactive approval should be forthcoming merely because the court would have given approval if timely requested. Such a lenient rule would subvert Congress' purpose in imposing a prior approval requirement. We have previously characterized the requirement of prior approval of employment as a means of ensuring "that the court may know the type of individual who is engaged in the proceeding, their integrity, their experience in connection with work of this type, as well as their competency concerning the same." Hydrocarbon, 411 F.2d at 205.

It has been suggested that these concerns can be amply attended to by the bankruptcy court's after-the-fact control over compensation, *see In re Bill & Paul's Sporthaus, Inc.*, 31 B.R. 345 (Bankr.W.D. Mich. 1983); *In re King Electric Co.*, 19 B.R. 660, 663 (E.D.Va. 1982), and the bankruptcy court's knowledge, through observation, of the attorney's presence and qualifications. *See In re Lauren Walch Co.*, 539 F.2d 1231, 1232 (9th Cir. 1976) (per curiam). *We reject the notion that a complete and thorough post-application review may substitute for prior approval in most cases. This approach would render meaningless the structure of the Bankruptcy Code and Rules which contain provisions requiring both prior approval of employment and after the fact approval of compensation.* 11 U.S.C. §§ 327(a), 1103(a), 330; Bankruptcy Rules 2014(a), 2016, 2017. (emphasis supplied)

¹ On or about May 6, 2019, the Office of the Disciplinary Counsel filed the attached Order to Show Cause, SCAP-19-0000355 (see Exhibit B).

The State of Hawaii, Department of Taxation has filed a Joinder in The Office of the United States Trustee filed a Motion to Convert Chapter 11 Case to Chapter 7 Or, Alternatively, To Dismiss Case. (Dkt. No. 32).

The State of Hawaii, Department of Taxation, by the Declaration of Lynn Yamamoto, noting in part (Dkt. No. 35):

4. The Debtor does not hold a State of Hawaii general excise tax license to report its business income it disclosed at its First Meeting of Creditors. The Debtor must apply for and obtain a State of Hawaii general excise tax license or clarify under what number the Debtor is reporting its business income.

See Exhibit C.

All of these developments require this Court grant the LLC's Motion to Annul the Automatic Stay Retroactive to the Petition Date, February 25, 2019, on the grounds set forth in the previous filings.

DATED: Honolulu, Hawaii, May 16, 2019.

A handwritten signature in black ink, appearing to read "Jerrold K. Guben", is written over a horizontal line.

JERROLD K. GUBEN
RANDOLPH R. SLATON
Attorneys for Movant
EBBTIDE, LLC

Exhibit A

Exhibit A

PlnDue

**United States Bankruptcy Court
District of Hawaii (Honolulu)
Bankruptcy Petition #: 19-00227**

Assigned to: Bankruptcy Judge Robert J. Faris
Chapter 11
Voluntary
Asset

Date filed: 02/25/2019
341 meeting: 04/24/2019
Deadline for filing claims: 07/23/2019
Deadline for filing claims (govt.): 08/26/2019

Debtor

Hawaiian Ebbtide Hotel, Inc.
2415 Ala Wai Boulevard, #1901
Honolulu, HI 96815
HONOLULU-HI
Tax ID / EIN: 32-0472034
aka Hawaiian Ebbtide Hotel
aka John Wollstein

represented by **Christopher S.B. Woo**

Star Consulting LLC
159 Kai'ulani Avenue
Honolulu, HI 96815
808.940.3244
Email: attorneychristopherwoo@gmail.com

U.S. Trustee

Office of the U.S. Trustee.
1132 Bishop Street, Suite 602
Honolulu, HI 96813-2830
808-522-8150

represented by **Curtis B. Ching**

Office of The United States Trustee
1132 Bishop Street, Suite 602
Honolulu, HI 96813
808.522.8150
Email: USTPRegion15.HI.ECF@usdoj.gov

Filing Date	#	Docket Text
02/25/2019	<u>1</u> (1 pg)	Chapter 11 Voluntary Petition Received. Government Proofs of Claim generally due by 8/26/2019.20 Largest Unsecured Creditors due 3/11/2019. Corporate Resolution or Other Authorization due 3/11/2019. Schedule A/B due 3/11/2019. Schedule D due 3/11/2019. Schedule E/F due 3/11/2019. Schedule G due 3/11/2019. Schedule H due 3/11/2019. Statement of Financial Affairs due 3/11/2019. Summary of Assets and Liabilities due 3/11/2019. Incomplete Filings due by 3/11/2019. (JN) (Entered: 02/25/2019)
02/25/2019	<u>2</u> (5 pgs)	Chapter 11 Voluntary Petition, Without All Required Schedules/Statements - See Docket Entry # 1 For

		Documents Due. (JN) (Entered: 02/25/2019)
02/25/2019	<u>3</u>	Receipt of Chapter 11 Filing Fee - \$1167.00 by JN. Receipt Number 141046. (CashRegs) (Entered: 02/25/2019)
02/25/2019	<u>4</u>	Receipt of Chapter 11 Filing Fee - \$550.00 by JN. Receipt Number 141046. (CashRegs) (Entered: 02/25/2019)
02/27/2019	<u>5</u> (3 pgs)	Notice of Appearance by Randolph R. Slaton and Request for Notice, . Filed by Randolph R. Slaton on behalf of Ebbtide, LLC. (Slaton, Randolph) (Entered: 02/27/2019)
02/27/2019	<u>6</u> (3 pgs)	Notice of Appearance by Jerrold K. Guben and Request for Notice, . Filed by Jerrold K. Guben on behalf of Ebbtide, LLC. (Guben, Jerrold) (Entered: 02/27/2019)
02/27/2019	<u>7</u> (2 pgs)	BNC Certificate of Service - Order to File Documents and Notice of Intent to Dismiss Case (related document(s): <u>1</u>) Notice Date 02/27/2019. (Admin.) (Entered: 02/27/2019)
03/11/2019	<u>8</u> (1 pg)	Motion to Extend Time to File Case Opening Documents . Filed by Hawaiian Ebbtide Hotel, Inc. . (DM) (Entered: 03/11/2019)
03/11/2019	<u>9</u> (1 pg)	<p><i>[The entire order in this matter is set forth in this docket entry. No document is attached.]</i></p> <p>ORDER GRANTING MOTION TO EXTEND TIME TO FILE DOCUMENTS (related document: <u>8</u>). The deadline is extended to <u>March 25, 2019</u> for filing Schedules A-J, and Statement of Financial Affairs. No extension is granted for other documents described in motion. IT IS FURTHER ORDERED that failure to file these documents by the extended deadline will result in dismissal of the case without further notice. Moreover, the Debtor and Joint Debtor, if any, will be barred from filing a subsequent bankruptcy petition for 180 days after the date that the dismissal order is entered. SO ORDERED. /s/ Robert J. Faris, United States Bankruptcy Judge. (Entered: 03/11/2019)</p>

03/11/2019	10	Notice of Appearance of Cynthia M. Johiro as Attorney representing Department of Taxation, State of Hawaii, Creditor. Counsel consents to service of notices, pleadings, and papers by court transmission facilities. This entry for record purposes only. (Johiro, Cynthia) (Entered: 03/11/2019)
03/13/2019	<u>11</u> (2 pgs)	BNC Certificate of Service - Clerk's Notice of Docket Entry (related document(s): <u>9</u>) Notice Date 03/13/2019. (Admin.) (Entered: 03/13/2019)
03/25/2019	<u>12</u> (40 pgs)	Schedules A/B, D, E/F, G, H, Summary of Assets and Liabilities and Certain Statistical Information, Statement of Financial Affairs, List of 20 Largest Unsecured Creditors. Amendment of Creditor List - Fee Amount: \$31 (JN) (Entered: 03/25/2019)
03/25/2019	<u>13</u> (2 pgs)	Notice of Filing Fee Due for Amended Creditor List (related document(s): <u>12</u> Schedules (Initial Filing)) (JN) (Entered: 03/25/2019)
03/25/2019	<u>14</u> (91 pgs; 12 docs)	Motion for Relief from Automatic Stay re: Ebbtide, LLC v. Hawaiian Ebbtide Hotel, Inc., Civil No. 12-1-3090 (First Circuit, State of Hawaii) <i>ANNUL Automatic Stay Retroactive to the Petition Date, February 25, 2019; Memorandum in Support of Motion</i> . Filed by Jerrold K. Guben on behalf of Ebbtide, LLC. Fee Amount \$181 (Attachments: # <u>1</u> Cover Sheet (Relief from Stay) # <u>2</u> Exhibit(s) A # <u>3</u> Exhibit(s) B # <u>4</u> Exhibit(s) C # <u>5</u> Declaration of Marcus Fullard-Leo # <u>6</u> Exhibit(s) 1 # <u>7</u> Exhibit(s) 2 # <u>8</u> Declaration of Randolph R. Slaton # <u>9</u> Exhibit(s) A # <u>10</u> Exhibit(s) B # <u>11</u> Exhibit(s) C) (Guben, Jerrold) (Entered: 03/25/2019)
03/25/2019		Receipt of filing fee for <u>14</u> Motion for Relief From Automatic Stay(19-00227) [motion,mot600] (181.00). Receipt No. 2690021. Fee amount \$ 181.00. (U.S. Treasury) (Entered: 03/25/2019)
03/25/2019	<u>15</u> (2 pgs)	Notice of Hearing . Filed by Jerrold K. Guben. Hearing for: <u>14</u> Motion for Relief From Automatic Stay. Hearing scheduled for 4/24/2019 at 09:30 AM at Courtroom, 1132 Bishop Street, Suite 250, Honolulu,

		HI 96813. (Guben, Jerrold) (Entered: 03/25/2019)
03/25/2019	<u>16</u> (1 pg)	Certificate of Service . Filed by Jerrold K. Guben. (Related document(s): <u>14</u> , <u>15</u>). (Guben, Jerrold) (Entered: 03/25/2019)
03/27/2019	<u>17</u> (3 pgs)	BNC Certificate of Service (related document(s): <u>13</u>) Notice Date 03/27/2019. (Admin.) (Entered: 03/27/2019)
03/29/2019	<u>18</u> (2 pgs)	Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors and Deadlines. 341(a) meeting to be held on 4/24/2019 at 02:00 PM at US Trustee Meeting Room, 1132 Bishop Street, Suite 606, Honolulu, HI 96813. Proofs of Claim due by 7/23/2019. Government Proofs of Claim due by 8/26/2019. (Ching, Curtis) (Entered: 03/29/2019)
04/03/2019	<u>19</u> (3 pgs)	BNC Certificate of Service - Notice of Bankruptcy Case, Meeting of Creditors and Deadlines (related document(s): <u>18</u>) Notice Date 04/03/2019. (Admin.) (Entered: 04/03/2019)
04/05/2019	20	Receipt of Amendment Filing Fee - \$31.00 by LC. Receipt Number 141122. (CashRegs) (Entered: 04/05/2019)
04/11/2019	<u>21</u> (7 pgs)	Opposition to Motion. Filed by Debtor Hawaiian Ebbtide Hotel, Inc. (Related document(s): <u>14</u> Motion for Relief From Automatic Stay filed by Ebbtide, LLC). (JN) (Entered: 04/11/2019)
04/16/2019	<u>22</u> (103 pgs; 5 docs)	Reply to Debtor's Opposition to Motion to Annul Automatic Stay Retroactive to the Petition Date . Filed by Creditor Ebbtide, LLC. (Related document(s): <u>14</u> Motion for Relief From Automatic Stay, <u>21</u> Response). (Attachments: # <u>1</u> Declaration of Randolph R. Slaton # <u>2</u> Exhibit(s) 1 # <u>3</u> Exhibit(s) 2 # <u>4</u> Exhibit(s) 3) (Guben, Jerrold) (Entered: 04/16/2019)
04/17/2019	<u>23</u> (1 pg)	Certificate of Service . Filed by Jerrold K. Guben. (Related document(s): <u>22</u>). (Guben, Jerrold) (Entered: 04/17/2019)

		Curtis Ching . Filed by U.S. Trustee Office of the U.S. Trustee.. (Related document(s): <u>30</u> Application to Employ). (Ching, Curtis) Modified on 5/3/2019 (JN). (Entered: 05/02/2019)
05/08/2019	<u>32</u> (52 pgs; 3 docs)	Motion to Convert Chapter 11 Case to Chapter 7 <i>Or, Alternatively, To Dismiss Case</i> . Filed by Office of the U.S. Trustee.. Hearing scheduled for 6/5/2019 at 02:00 PM at Courtroom, 1132 Bishop Street, Suite 250, Honolulu, HI 96813. (Attachments: # <u>1</u> Exhibit(s) A - B) (Ching, Curtis) (Entered: 05/08/2019)
05/09/2019	<u>33</u> (1 pg)	Certificate of Service . Filed by. (related document(s): <u>32</u> Motion to Convert Ch 11 Case to Ch 7 (UST)). (Au, Lisa) (Entered: 05/09/2019)
05/10/2019	<u>34</u> (2 pgs)	BNC Certificate of Service - Notice of Hearing (related document(s): <u>32</u>) Notice Date 05/10/2019. (Admin.) (Entered: 05/10/2019)
05/13/2019	<u>35</u> (4 pgs)	Joinder in US Trustee's Motion to Convert Case to Chapter 7 or to Dismiss Case filed on May 8, 2019 . Filed by Creditor Department of Taxation, State of Hawaii. (Related document(s): <u>32</u> Motion to Convert Ch 11 Case to Ch 7 (UST)). (Johiro, Cynthia) (Entered: 05/13/2019)
05/13/2019	<u>36</u> (2 pgs)	Certificate of Service . Filed by Cynthia M. Johiro. (Related document(s): <u>35</u>). (Johiro, Cynthia) (Entered: 05/13/2019)
05/13/2019	<u>37</u> (2 pgs)	Declaration of Cynthia M. Johiro <i>Regarding Department of Taxation, State of Hawaii's Joinder to Motion to Convert Case to Chapter 7 or to Dismiss Case</i> . Filed by Cynthia M. Johiro. (Related document(s): <u>35</u>). (Johiro, Cynthia). **Modified on 5/13/2019 [Clerk's Note: Added relation to document no. <u>32</u> .]**(JN). (Entered: 05/13/2019)
05/13/2019	<u>38</u> (3 pgs)	Declaration of Lynn Yamamoto <i>Regarding Department of Taxation, State of Hawaii's Joinder to Motion to Convert Case to Chapter 7 or to Dismiss Case</i> . Filed by Cynthia M. Johiro. (Related

document(s): 35). (Johiro, Cynthia). **Modified on 5/13/2019 [Clerk's Note: Added relation to document no. 32.]**(JN). (Entered: 05/13/2019)

PACER Service Center			
Transaction Receipt			
05/16/2019 06:07:14			
PACER Login:	Jerroldkguben:4898493:4956868	Client Code:	
Description:	Docket Report	Search Criteria:	19-00227 Fil or Ent: filed Doc From: 0 Doc To: 99999999 Term: included Headers: included Format: html Page counts for documents: included
Billable Pages:	4	Cost:	0.40


04/24/2019	<u>24</u> (1 pg)	 PDF with attached Audio File. Court Date & Time [4/24/2019 9:35:39 AM]. File Size [2620 KB]. Run Time [00:10:55]. (admin). (Entered: 04/24/2019)
04/24/2019	<u>25</u>	Minutes of hearing on PH: Motion for Relief from Automatic Stay held on 04/24/2019. Disposition: Matter will be a continued Preliminary Hearing set for 05/21/2019 at 09:30 AM. Automatic stay remains in effect. Movant required to notice the unsecured creditors. Optional: Unsecured creditors may file response by 5/14/2019, and Movant may file by close of business day, 5/17/2019. Appearances: Jerrold K. Guben (Hawaiian Ebbtide Hotel, LLC), Christopher S.B. Woo (Hawaiian Ebbtide Hotel, Inc.). (related document(s): <u>14</u> Motion for Relief From Automatic Stay). (sh) (Entered: 04/24/2019)
04/24/2019	<u>26</u> (2 pgs)	Notice of Hearing . Filed by Jerrold K. Guben. Hearing for: <u>14</u> Motion for Relief From Automatic Stay, 25 Minutes - Continued. Hearing scheduled for 5/21/2019 at 09:30 AM at Courtroom, 1132 Bishop Street, Suite 250, Honolulu, HI 96813. (Guben, Jerrold) (Entered: 04/24/2019)
04/24/2019	<u>27</u> (3 pgs)	Certificate of Service . Filed by Jerrold K. Guben. (Related document(s): <u>14</u> , <u>22</u>). (Guben, Jerrold) (Entered: 04/24/2019)
04/24/2019	<u>28</u> (3 pgs)	Certificate of Service . Filed by Jerrold K. Guben. (Related document(s): <u>26</u>). (Guben, Jerrold) (Entered: 04/24/2019)
05/01/2019	<u>29</u> (1 pg)	Designation of Responsible Individual: Marc T. Kumai. Filed by Hawaiian Ebbtide Hotel, Inc. (JN) (Entered: 05/01/2019)
05/01/2019	<u>30</u> (2 pgs)	Application to Employ Christopher S. Woo as Attorney for Debtor-in-Possession; Verified Statement by Professional. Filed by Debtor Hawaiian Ebbtide Hotel, Inc. (JN) (Entered: 05/01/2019)
05/02/2019	<u>31</u> (9 pgs)	United States Trustee's Objection To Debtor's Application To Employ Counsel; Declaration of

Exhibit B

Exhibit B

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Supreme Court
SCAD-19-0000355
06-MAY-2019
02:01 PM

SCAD-19-0000355

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,
Petitioner,

vs.

CHRISTOPHER S.B. WOO,
Respondent.

ORIGINAL PROCEEDING
(ODC Case No. 18-0220)

ORDER TO SHOW CAUSE

(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

On April 23, 2019, the Office of Disciplinary Counsel (ODC) submitted a petition, approved by the Chair of the Disciplinary Board of the Supreme Court of the State of Hawai'i, requesting this court enter an order upon Respondent Christopher S.B. Woo, pursuant to Rule 2.12A of the Rules of the Supreme Court of the State of Hawai'i (RSCH), requiring him to inform this court, within 10 days of service of the petition, of any reason why he should not be immediately suspended from the practice of law for failure to respond to ODC's lawful inquiries related to its investigation into allegations of misconduct made

Exhibit B

against him. Upon a careful review of the record, we conclude issuance of an order to show cause is warranted. Therefore,

IT IS HEREBY ORDERED that ODC's petition is granted. ODC shall serve the order to show cause upon Respondent Woo by personal service, as required by RSCH Rule 2.11(a) or shall submit further documentation regarding the impossibility of such service, pursuant to RSCH Rule 2.11(a).

IT IS FURTHER ORDERED that Respondent Woo, upon personal service of this order upon him, shall file with this court an answer, within 10 days after service of this order upon him, informing this court of any reasons as to why he should not be suspended from the practice of law immediately, pursuant to RSCH Rule 2.12A(a), for failure to cooperate with ODC's investigation.

DATED: Honolulu, Hawai'i, May 6, 2019.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson



Exhibit C

Exhibit C

CLARE E. CONNORS 7936
Attorney General of Hawaii

GARY S. SUGANUMA 6960
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Attorneys for the
DEPARTMENT OF TAXATION,
STATE OF HAWAII

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re

HAWAIIAN EBBTIDE HOTEL,
INC. aka HAWAIIAN EBBTIDE
HOTEL aka JOHN WOLLSTEIN,

Debtor.

CASE NO. 19-00227
(Chapter 11)

Re: Docket Entry No. 32

Hearing:

Date: [To Be Set]

Time: [To Be Set]

Judge: Honorable Robert J.
Faris

DECLARATION OF LYNN YAMAMOTO REGARDING
DEPARTMENT OF TAXATION, STATE OF HAWAII'S
JOINDER TO MOTION TO CONVERT CASE TO CHAPTER 7
OR TO DISMISS CASE

Exhibit C

1. I am a Delinquent Tax Collection Assistant II, Collection Division, for the First Taxation District (Oahu), Department of Taxation, State of Hawaii. As such, I am authorized and empowered to compute and collect all general excise, income, and other tax liabilities due the State of Hawaii, to file tax liens upon property and rights to property belonging to any person liable to pay tax, to monitor payment of the Debtor's outstanding tax liabilities, to file proofs of claim for outstanding tax liabilities of the Debtor, and to enforce such claims, liens, and other rights of the State of Hawaii in respect thereof.

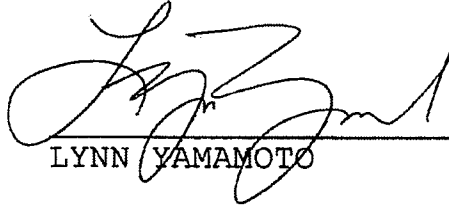
2. As part of my duties, I have been assigned to monitor the above-captioned bankruptcy case to determine whether the Debtor has fulfilled its obligations to timely file all appropriate tax returns and to pay any tax liabilities thereon.

3. I have reviewed the records of the Department of Taxation relating to the Debtor and am competent to testify as to the matters stated herein.

4. The Debtor does not hold a State of Hawaii general excise tax license to report its business income it disclosed at its First Meeting of Creditors. The Debtor must apply for and obtain a State of Hawaii general excise tax license or clarify under what number the Debtor is reporting its business income.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: Honolulu, Hawaii, MAY 13 2019.


LYNN YAMAMOTO